UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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MICHELE BAKER, ANGELA CORBETT, et al., *

Plaintiffs, *

-v- 16-cv-917 *

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION and *

HONEYWELL INTERNATIONAL, INCORPORATED, *

Defendants. *

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LAWRENCE E. KAHN
December 7, 2016
445 Broadway, Albany, New York

A P P E A R A N C E S

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COURT CLERK: Wednesday, December 7th, 2016, the case is Michele Baker, Angela Corbett, Daniel Schuttig, Michael Hickey, Charles Carr, Pamela Forrest, Kathleen Main-Lingener, Kristin Miller, James Morier, Jennifer Plouffe and Silvia Potter versus Saint-Gobain Performance Plastics Corporation and Honeywell International, Incorporated, case number 1:16-cv-917.

We are here for a motion hearing. May we have appearances for the record, please.

MS. GREENWALD: Good morning, your Honor. Robin Greenwald for the plaintiffs.

MR. SCHWARZ: Stephen Schwarz for the plaintiffs.

THE COURT: Mr. Schwarz.

MS. BIRNBAUM: Your Honor, Sheila Birnbaum for the defendant Saint-Gobain.

THE COURT: Ms. Birnbaum.

MS. PREHEIM: Good morning, your Honor. Elissa Preheim for defendant Honeywell.

THE COURT: Ms. Preheim.

MR. CURRAN: Good morning, your Honor. Patrick Curran, Saint-Gobain.

THE COURT: Very good. So, apparently, as I understand it, there's going to be two attorneys arguing on each side. Am I correct about that?

MS. BIRNBAUM: Yes, your Honor.

THE COURT: And we should be done a little before noon, in that area. So, I say each of you should go about ten minutes and then reply, you will have a little time to reply to each other if that sounds workable.

MS. BIRNBAUM: Yes, your Honor.

MS. GREENWALD: Yes, your Honor.

THE COURT: No bell or lights here. Use our heads and I guess we will begin. Obviously we have Ms. Birnbaum.

MS. BIRNBAUM: Yes. Thank you, your Honor.

THE COURT: Proceed.

MS. BIRNBAUM: Your Honor, I'm going to address the medical monitoring causes of action and Ms. Preheim will discuss the property causes of action, just to give you a road map of where we are headed.

As Your Honor knows, there also was a motion to dismiss the injunctive relief here, remedial relief, and parties have stipulated and Your Honor has ordered that that be stayed until April because many of the issues raised by those motions may go away because a lot of the remedial work is being done.

There is a permanent filter being put into the municipal systems, paid for by the defendants, and POETS

have been put on the private wells. So that's off the table.

THE COURT: I'm aware of that, yes.

MS. BIRNBAUM: Thank you. And so we go on to the medical monitoring claim. Your Honor, the plaintiffs' claim should be dismissed for medical monitoring because it fails to state a cause of action under New York law.

We are not writing on a clean slate here because the New York Court of Appeals has clearly stated what gives rise to damages from medical monitoring or cause of action for medical monitoring, and the Caronia case, which was decided recently by the New York Court of Appeals, governs here under Geary. I think Your Honor needs to follow Caronia. It is the existing law in New York.

And what does Caronia tell us? Caronia tells us, first of all, that New York does not recognize a cause of action for medical monitoring, an equitable medical monitoring, and in reaching that decision, the New York Court of Appeals clearly weighed and balanced the public policy issues of whether there should be a cause of action or recovery for asymptomatic plaintiffs in New York. That is, plaintiffs that do not have a present physical injury.

The plaintiffs in this case, in fact, the plaintiffs have excluded from their class anyone who files a personal injury case. So, they understand that they are seeking medical monitoring damages and I'd like to get back to that because they're really not seeking damages. They're really seeking injunctive relief here.

What they have asked in their complaint is not for damages for medical monitoring, that goes to individual plaintiffs. What they're talking about is setting up a program of medical monitoring, an injunctive relief, and that would then lead to a fund to be created that would be paid for by the defendants. That is exactly what the plaintiff was requesting in Caronia. In Caronia the plaintiff -- does Your Honor have a question?

THE COURT: Well, I'm thinking you do cite Caronia, the case of Askey, but in that case didn't they cite a case called Abusio, which seems to support that the fear of contracting a disease is a physical injury, which was implied in Abusio and that was cited by Caronia favorably?

MS. BIRNBAUM: This is not a fear case. This is not a fear case. This is really, when you get down to it, a case of plaintiffs -- they have a fear for PFOA in their blood and accumulation for PFOA is what the injury is. They call that a physical injury. Well, that was

before the Court in Caronia. Caronia could not find that it was a physical injury. In fact, in Caronia, the plaintiffs there were arguing exactly like the plaintiffs here, that they had cellular damage, that the cigarette smoke caused cellular damage and that was physical injury.

The Court did not agree with them. The Court treated it as an exposure case that did not have a physical injury and the Court found that there was no cause of action for medical monitoring but the Court also found, and stated very strongly, that not only was there no cause of action, but you had to sustain a physical injury, a physical injury before you could recover tort.

So it's -- it was basic tort law that the Court was looking at. If you had a negligence cause of action, you have to plead and prove duty, breach of duty and actual injury. Actual injury. A physical injury. If you had kidney cancer, then you have a physical injury. But the fact that you have -- that was why it was being argued in Caronia, too. The fact that you had an accumulation of a chemical in your bloodstream, that does not give rise to a physical injury under New York law and that New York Court of Appeals told everybody why that was. They went through the rationale. And, by the way, plaintiffs never talk about the rationale of the decision

and what was the rationale of the decision? The New York Court of Appeals cites to the U.S. Supreme Court case in Buckley against Metro-North, which also denied common law right to medical monitoring and the -- the --

THE COURT: I was going to say, also a case, which I don't know if you cited it, the World Trade Center Lower Manhattan Disaster Site case, that was a Second Circuit, which also seemed to imply what was said in Abusio was saying this kind of case there was, there is a physical injury. Did you see that case?

MS. BIRNBAUM: Your Honor, I'm familiar with that case. I was a special master in those cases but that also was quite different than what we have here. There they were alleging physical injury.

THE COURT: Right.

MS. BIRNBAUM: The fact was that they were injured. Here they're not alleging physical injury, they are alleging only accumulation of PFOA in their blood, risk of injury, which clearly, under New York, does not give rise to physical injury, and that there was subcellular or cellular or genetic changes. That's exactly what was before the Court in Caronia.

The Court said that's really not a present injury and there are a number of Courts that have said so since that time. There are two PFOA cases we cited, your

Honor. One from the Fourth Circuit and one from the District Court in Alabama in which the exact same arguments were made but the law in those states were not any different than the law of New York, that had to establish a present physical injury in order to recover medical monitoring damages. The Court said accumulation or changes in cells are not a present physical injury.

And, your Honor, reason for that is cells can change. That's not an injury. The Supreme Court noted that in Metro-North as well and the reason for that is if that is an injury, then millions, tens of millions of people would have a cause of action. All the people that have been exposed to asbestos has accumulation of asbestos in their body and cellular changes. That doesn't mean they have a present injury, and almost every Court that has looked at this says that is not a present injury that would give rise to medical monitoring damages and that is why the plaintiffs here do not have a cause of action. They can call it a physical injury but it just isn't, and that was before the Court in Caronia. It is not dicta in Caronia when the Court says you have to have a physical harm before you can recover in tort.

And if that was the case, and the Court says this in no uncertain terms, we would have limited liability. There would be no way to serve this

liability. The courts would be overwhelmed with cases in which people say I have been exposed to a harmful chemical and, therefore, I have cellular changes and I'm entitled to medical monitoring cases.

The public policy reasons -- and by the way, in -- in -- in Caronia, the Court carefully weighed the fact, isn't there some positives by having a medical monitoring? Wouldn't it be a good idea from -- from a policy point of view to have medical monitoring to see if you can determine if there is injury. And the Court weighed that against the Court's determination, following the U.S. Supreme Court, saying it would -- it would lead to liability that was limitless. There would be no way for the courts to limit the liability.

There would be no way to take out the speculative nature of these claims and, therefore, the Court, weighing the pros and cons, tell that you have to have a present injury and they do not have a present injury, no matter how they try and, your Honor, I -- in Caronia, if you look at that case, and we looked at the briefs very carefully, there were clearly argument in Caronia. There was clearly arguments made that there was a present injury and that was the accumulation of smoke and cellular changes and that was rejected by the New York Court of Appeals as it has been rejected by the

Seventh District of Alabama in PFOA cases and it has been rejected by the Fourth Circuit in another PFOA case.

If we allow this case in this instance, not only will the federal court be making new law that is contrary to New York law, but it would be opening the floodgates that thousands and thousands and thousands, millions of plaintiffs who have been exposed, who have no present injury.

New York law is clear. If you look at the Ivory case, what the Court did in Ivory is said, if you had kidney cancer, you then can have a medical monitoring damages arising from your kidney cancer. But if you only have exposure and accumulation, you have no cause of action for medical monitoring.

THE COURT: In Ivory -- you mentioned Ivory. Did that involve a claim for contamination of drinking water? I don't think it did.

MS. BIRNBAUM: It was. It was a -- my recollection, it was contamination case.

THE COURT: Source -- of a source --

MS. BIRNBAUM: Of the Fourth Department. The Fourth Department reviewed the Supreme Court and came to the conclusion that the dismissal of the medical monitoring cases for asymptomatic plaintiffs, that we have here, was proper. The case should be dismissed.

The only case that was allowed to go forward for personal injury was the person who had kidney cancer, his case could go forward because he had a present injury.

THE COURT: So you're suggesting, you're saying or alleging or contending that a water source of a home that's contaminated and causes a homeowner to lose his investment in the house, there's no legal -- no legal remedy for him basically?

MS. BIRNBAUM: I think what Your Honor is suggesting, if you could show that you had a property damage, does that give you the right to medical monitoring and I think here the answer would be --

THE COURT: There's no property.

MS. BIRNBAUM: There's -- they're not alleging property damage. They're alleging other things that my co-counsel will discuss but I think also, if you look at the cases very carefully, I think Ivory would be wrong on that case and you could have to have -- Caronia Court was so clear that you have to have a present physical injury and it cannot be that you have a physical injury if you have no symptoms, if you have no manifest injury.

This is just a exposure case. It is increased risk case and the New York Courts have clearly said those cases are not able to recover medical monitoring.

THE COURT: Okay.

MS. BIRNBAUM: Thank you.

THE COURT: I appreciate the argument and --

MS. BIRNBAUM: Thank you, your Honor. I hope I stayed within my time.

THE COURT: Well, you did. You did okay.

MS. BIRNBAUM: Thank you.

THE COURT: I think maybe we should hear the other side as to -- since we are doing issue by issue, maybe right now I'd like to hear the plaintiffs' response to that one issue and then I'll hear the other side and then back here.

MR. SCHWARZ: Thank you, your Honor. Stephen Schwarz for the plaintiffs.

THE COURT: Right.

MR. SCHWARZ: Your Honor, I think on any motion to dismiss case, Rule 12, the place to start is the pleadings and one of the things that we disagree with vehemently is the defendants' interpretation of our pleadings.

The defendants have argued in their brief that our claim for injury is increased risk of future disease. That is a consequence of the injury we're claiming but not the injury we're claiming.

Ms. Birnbaum started out by taking about a cause of action for medical monitoring. We didn't allege

a cause of action for medical monitoring. We allege consequential damages of medical monitoring attaching to the other common law tort claims of negligence and trespass. So right from the outset, and if you look at our brief, it is unambiguous in that we say that -- at paragraph 165, plaintiffs in the biomonitoring class suffer injury and damage at the cellular and genetic level by accumulation of PFOA in their body.

Page 166 -- excuse me -- paragraph 166 we state plaintiffs in the class have suffered and continue to suffer damages, including personal injury, due to the accumulation of PFOA in their bodies.

So, again, the Court of Appeals recognized in the Snyder case that disease was a consequence of injury, not the injury itself. The injury was complete upon toxic invasion. What we're alleging is that the toxic invasion, the injury, these people are indeed at increased risk of future illness. That's what the remedy of medical monitoring is intended to do, to provide them with screening and early diagnosis and treatment. But the injury is the toxic invasion.

So, under Rule 12 basically we have alleged an injury. Now, the Court clearly understands under Rule 12 that our allegations are deemed true at this stage unless -- unless the defendants can point to case law

that says that our allegations of injury are insufficient as a matter of law.

Your Honor, as it turns out, not only is that not true but there are nine Court of Appeals cases spanning 80 years saying that the allegations we made are an injury as a matter of law. Those cases started with the Schmidt case and most recent -- not most recently but in 1995, for instance, the Consorti case and it's interesting. Again, Ms. Birnbaum, in their briefs, spent very little time talking about nine Court of Appeal cases that say exactly this, Judge. They say, in a right mind readily verifiable rule was adopted in which, as a matter of law, the tortious injury is deemed to have occurred upon the introduction of the toxic substance into the body. That was in Consorti in 1995.

It was followed in that same year by Rothstein, which says an unbroken string of this Court's decisions from Schmidt in 1936 to Consorti this year has upheld this benchmarks that injury occurs upon the invasion of the body.

So, the law in New York State has been, for 80 years, that an injury sufficient to support a cause of action for negligence occurs when the toxic invasion is in the body. So --

THE COURT: Everyone is citing, you're citing

to the Caronia case and does that case seem to expressly rule out claims for increased risk of developing cancer or other diseases?

MR. SCHWARZ: Your Honor, that -- let me get to that. If I could answer your question saying that -- the only way that that line of 80 years of precedence in New York State could be overruled is if it's overruled by the Court of Appeals and here in the Caronia case or if it was overruled by statute.

So let's look at the Caronia case. What did the Caronia case hold? The Caronia case, of course, was a case where the Second Circuit certified a question to the New York Court of Appeals and that question specifically was, Does New York recognize an independent equitable cause of action for medical monitoring or will it create one basically because none had ever been recognized before.

What the Caronia Court held in answer to that question was no. They refused to -- to adopt an independent equitable cause of action for medical monitoring for plaintiffs who had no alleged present injury. That's the first hold. The second part was, in New York medical monitoring damages are available to plaintiffs who can otherwise state a cause of action for negligence as a result of alleged damage to person or

property.

So what the Court of Appeals said is, we have common law torts in New York. They require either injury of property or injury to person. If you can meet those standards, then you can -- then you can recover consequential medical monitoring damages, assuming that you prove the elements that are required for doing that. But without any present injury or without any injury to property, there is no claim for equitable claim, the Court would not go that far and, of course, there was a vehement dissent on that.

But what I'm saying, your Honor, is, those are the two points that are made in Caronia and neither of them overturns or refute the 80 years of precedence in New York State that injury happens at toxic invasion and the important part of Caronia, which was not mentioned on the argument by my learned counsel, was that the plaintiffs in Caronia did not claim a present personal injury. In fact, they chose not to claim that because the statute of limitation argument would be -- they would lose the cases on statute of limitations. All these people were smokers for years and years and years and their only hope of having any recovery was for the Court to recognize a new cause of action for medical monitoring, and to set the accrual of that upon the

invention of a test that would allow people to be screened safely for lung cancer, which they allege happened within three years of when they sued.

So they never made -- they certainly made the argument that -- that cigarette smoke is toxic but they never made the argument that the plaintiffs had suffered a present injury and that's clear in the -- in the decision at Page 446 of the decision. Right at the beginning, the Court says, plaintiffs do not claim to have suffered physical injury or damage to property and later on in that same page they say, having alleged no physical injury or damage to property in their complaint, plaintiffs' only potential pathway to relief is for this Court to recognize a new tort, namely, an equitable medical monitoring cause of action.

Therefore, the plaintiffs in Caronia did not, as defendants argue, present the argument we're presenting. They never alleged that these smokers had toxic invasion of the body and that being an injury. They only alleged that smoking caused them to suffer an increased risk and, therefore, they should have medical monitoring but they needed this new devised cause of action to get there because the statute of limitations issues were shot.

From our standpoint, Judge, nothing in the

Caronia decision specifically overturned 80 years of precedence in New York. There's nothing -- there's not one quote from the Caronia decision that the defendants can point to that says that the Court explicitly said that that line of cases that we have -- we have reinforced time and time again for 80 years is no longer to be followed.

In fact, what the Caronia Court did say was that they cited to Schmidt and -- Schmidt and Askey and they cited to them favorably and said, in those cases, there was a physical injury. The Courts found physical injury. Even though it was a slight physical injury, it was a physical injury and that distinguished what was being argued in Caronia from those cases because, in Caronia, the plaintiffs explicitly said we're not claiming a present personal injury.

And in Askey's holding, what Askey said is the defendant is liable for reasonable, anticipated, consequential damages which may flow later from a toxic invasion although the invasion itself is an injury too slight to be noticed at the time of inflicted. The Court also brought out Abusio case. The Abusio case not only -- which was cited by the Court of Appeals and not only did the Court say the fear of cancer was an injury but also the accumulation of a toxic substance in the

body was an injury and that was recited in the -- in the Allen case as well. That -- that accumulation of the toxic in the body was considered an injury and, of course, that -- that went in line with Schmidt and 80 years of precedence to say that.

Now, the defendants tried to argue that, well, those cases, which they didn't mention on -- on oral argument, they say that they have statute of limitations cases because Judge Pigott in his majority decision said that was for accrual purposes.

Well, what does "accrual" mean? Accrual -- according to the Court of Appeals in the Connecticut case, means that all of the elements of the cause of action necessary for relief in Court are present and accrual then requires injury to be present. So the Courts have held that -- in other words, it would be -- it would be anomalous, in fact, it would be illogical to say that you have a cause of action accrues for purposes of statute of limitations purposes but then it should be dismissed immediately because there's no present injury.

Those two concepts cannot fit together. So, what the Court of Appeals has long held and not change, and Caronia doesn't change, is that invasion of the body by a toxic substance is an injury which was sufficient to support a cause of action and have that cause of action

accrue.

So Caronia doesn't overturn that line of cases and, again, one would think if a Court wanted to overturn 80 years' worth of precedence that they spent their time to describe as a right line readily verifiable rule would do so explicitly and they didn't. They didn't mention it because that issue really wasn't presented to them in that case because the plaintiffs didn't want to present the issues of physical injury.

So the next argument that the defendants make in their brief is, well, the legislature passed 214(c) in 1985 that changed the rule. They, again, don't mention that in their oral argument but that is not true, either, your Honor. I quote Judge Wesley, in the MRI Broadway case, where he says -- and this was in 1998 which was -- this would be 13 years after the statute was passed -- he said for over 60 years this Court has held that a cause of action in toxic exposure cases accrues upon initial exposure to the toxic substance. While the legislature has chosen to temper the effects of this rule through the adoption of discovery inspection for certain toxic sources, the statute does not change this Court's basic definition of injury, which is at the time of the invasion of the body and the Germantown and the MRI case and the Jensen case also make clear that 214(c) was not a

statute that was passed to re-define injury in New York. It was a statute that was passed to toll the statute of limitations from the date of injury until the date of discovery of the injury and that is what that section did.

So 214(c) in no way -- according to Judge Wesley's own statement, in no way changed the rule that New York has followed for 80 years.

The defendants then fall to the policy arguments and try to say that the floodgates would open to allow people who have been exposed to toxic substances and accumulations in their bodies to recover in New York, and basically what they're saying is that the law of New York, 80 years has opened the floodgates because that's been the law in New York for 80 years.

But the premise behind the policy statements in Caronia was clear. At the outset, as I just read to the Court, the Court says the plaintiffs do not claim present physical injury. So the concept behind those statements by the Court with regard to policy were without a physical injury, we do not think it's appropriate to allow anyone to bring a cause of action. There has to be a physical injury or an injury to property.

But remember this too, your Honor. The defendants' argument appears to be, well, unless there is

physical illness, which, again, the Snyder case made clear the illness is a consequence of injury, it's not the injury. But unless there's physical illness, the Court of Appeals made clear they don't want asymptomatic plaintiffs to be able to recover medical monitoring damages. The Court of Appeals could have done that in Caronia. They chose not to.

The Court of Appeals made it very clear that consequential medical monitoring damages are recoverable by people who have damaged property.

People who have damaged property don't have physical personal injuries. They have an injury sufficient to bring a negligence claim and what the Court of Appeals said, as long as there's an injury sufficient to bring a negligence claim, consequential medical monitoring damages can be recovered.

Your Honor, the real policy issue here is the defendants' argument that the children of Hoosick Falls should not be covered by a medical monitoring class because that is exactly what they are. In other words, we can have -- some of the plaintiffs are here today that have property damage. They would be able to bring a cause of action. They would be able to recover medical monitoring damages. Those property owners whose property has been damaged but their children, who were exposed to

exactly the same water and in fact have a higher risk of illness because of their small body mass, would not be because they're not property owners and they don't have property damage. The Court of Appeals never intended that to be the outcome of this type of interpretation and Caronia didn't even address this particular scenario because Caronia plaintiffs admitted they didn't have a personal injury. They didn't have any present injury.

So, your Honor, our argument is basically that without those nine Court of Appeals cases clearly stating the rule being overturned, our allegations are not only sufficient to go forward in this case, they're actually, as a matter of law, proof that we have had sufficient injury and the cases that the -- that --

The final thing I'll mention, your Honor, is that there are several cases the defendants cite to, federal cases from other jurisdictions. Two of those cases interpret a federal statute, not New York law. They -- they -- the Price-Anderson Act, which was the exclusive nuclear accident legislation, has specific definitions in that Act. Those two cases only interpret that specific definition, has nothing to do with this case. The other two cases, Rhodes and most recent case from Alabama, both interpret laws from other states, and if you look at the -- at the West Morgan case, one

they most recently cited --

THE COURT: You don't have much time if we want to let our other --

MR. SCHWARZ: Sorry, your Honor.

THE COURT: I'm not -- I got just, I wanted to, instead of doing the reply right now, let me get to the other issues and then we will do replies at the end.

MS. BIRNBAUM: Thank you, your Honor.

THE COURT: Hopefully there will be. Right now I guess it's Ms. Preheim?

MS. PREHEIM: Yes. Thank you, your Honor. My name is Elissa Preheim, I'm on behalf of Honeywell. Plaintiffs' remaining claims at issue today are tort claims for property damages, which I will address. Plaintiffs' claims must be dismissed because plaintiffs lack standing to sue for contamination of groundwater which they do not own and they do not allege physical harm to their property, unnecessary predicate to recover in tort for economic harm.

Here, none of the named plaintiffs alleged any such physical harm. Plaintiffs' claims are premised on alleged injury to groundwater but groundwater is a public resource held by the state, indeed the state is already addressing the groundwater in Hoosick Falls through remediation under enforceable consent decrees.

Plaintiffs do not contest that groundwater is not their property under New York law. Instead, their opposition brief now asserts a purported injury that is nowhere alleged in their complaint.

The brief asserts that plaintiffs sustained physical harm to their property -- properties because PFOA is in their soil but the complaint conspicuously does not allege that PFOA is in the soil of any of the 11 plaintiffs' properties. Plaintiffs' brief also argues that they sustained physical harm to property because PFOA was inside their wells, pipes or taps at some point but the complaint does not allege that any physical damage or invasion to these items.

Finally, plaintiffs' claims do not sound private nuisance under New York law which limits private nuisance to something that impacts one or relatively few. So I want to start by discussing standing to sue for groundwater contamination.

THE COURT: Let me ask you one quick question.

MS. PREHEIM: Sure.

THE COURT: We view this as a negligence claim instead of a trespass claim. Isn't this just a question of the scope of the defendants' duty as was put in a case you cite a lot, which is 532 Madison Avenue? In other words, why isn't a home whose supply of water is

contaminated by pollution in groundwater within the zoning of danger if we take that approach?

MS. PREHEIM: Your Honor, because under New York law, both negligence and strict liability require a physical injury to plaintiffs' property. That's in the 55 Motor case; Rebecca Moss case that we cite, which affirms dismissal of the negligence claim and cites the 532 Madison. In other words, New York law imposes no duty to protect against purely economic losses, such as alleged diminution of the property value here.

In the 532 Madison case, the businesses located near a collapse, brought negligence claims for alleged loss of income due to the street closures, but the Court of Appeals of New York held that those negligence claims had to be dismissed because there was no accompanying allegation and physical injury. In fact, plaintiffs concede in their opposition brief that New York law prohibits recovery of purely economic losses where the plaintiffs have sustained neither personal injury or property damage; that is at Page 24 and 25.

Here, none of the plaintiffs allege any physical injury and, in fact, plaintiffs appear to recognize that the alleged groundwater contamination is not a physical injury to property that can support their

tort claims, including negligence.

Although their complaint refers to water more than 170 times, plaintiffs' opposition brief now argues that this case is really about soil contamination but the soil in the names plaintiffs' properties is not mentioned anywhere in the complaint.

The complaints only references to PFOA in the soil relates to the Hoosick Falls landfill and the McCaffrey Street facility. But even then, those allegations state PFOA can migrate from the soil to the groundwater. So, really, those allegations simply reinforce that plaintiffs' claims are about alleged groundwater contamination and, tellingly, while the complaint alleges whether PFOA was detected in municipal water supply or in private wells and at well levels, the complaint never alleges that PFOA was detected in a soil of any of the named plaintiffs' properties.

Now, plaintiffs' opposition brief also asserts that PFOA physically injured their properties through contamination of wells, private wells and traveled through their pipes and flowed out of their taps and showerheads but while the wells, pipes, taps and showerheads are alleged to be conduits for allegedly contaminated groundwater, the complaint does not allege that the PFOA caused any damage to any of these items.

There are no allegations that the wells, pipes, taps were damaged by contact of PFOA. There are no allegations these items stopped functioning. That is fatal to their negligence claim but it also -- New York law rejects that notion that trespass claims can be -- can be based on an invisible invasion without tangible damage.

THE COURT: Now, this same argument you apply to the wells that are owned -- private wells as opposed to the house?

MS. PREHEIM: Yes. For negligence, correct, for municipal and for private wells.

THE COURT: Okay.

MS. PREHEIM: The plaintiffs only assert trespass as to the private well owners. But as we cited in our brief and Celebrity Studios and the Ivory case, New York does not recognize trespass based on invisible invasion without tangible damage and, notably, under federal court case we apply this principle to reject nearly identical claims in another PFOA groundwater case and that was the West Morgan case describing our brief.

In addition, the Ivory case dismissed trespass claims based on alleged vapor invasion and air emissions which included were only tangible -- intangible, excuse me, your Honor.

Again, here, too, plaintiffs don't allege that PFOA caused any physical or structural damage to their wells, pipes, taps or showerheads and because they failed to plead any physical injury to their property, they cannot state a claim under New York law for diminution of property values.

The widely accepted, if not universal, view under New York U.S. Court is causing the value of another's property to diminish is not, in and of itself, a basis for tort liability. Something more, such as physical injury, is required. Here, plaintiffs failed to allege that something more.

As I've discussed briefly previously and as in the Ivory case, groundwater doesn't belong to the owners of real property. Therefore, allegations of groundwater contamination do not plead injury to property. Consistent with this injury requirement under New York law, Courts applying the laws of other jurisdictions have dismissed negligence claims based on alleged groundwater contamination. For example, we cite in our briefs the Rhodes case where the plaintiffs alleged PFOA contamination in the public water supply but the Fourth Circuit held that such allegation of contamination alone does not constitute injury to support negligence claim.

The District of New Jersey reached the same

conclusion in the Player case, which was affirmed by the Third Circuit. There, residential property owners, MTBE contamination of their aquifer, the source of their drinking water, wells, but the Court there found negligence requires injury and a release of contamination into the groundwater aquifer does not itself establish injury.

So, plaintiffs cannot state a tort claim for property damages here because they alleged groundwater contamination is not a physical injury to plaintiffs' property and they have not alleged any other physical invasion or damage to their property.

I briefly want to turn to plaintiffs' private nuisance claims. A private nuisance under New York law is that which threatens one person or relatively few. Here, however, plaintiffs' claims are based on allegations there has been a widespread harm affecting the use of groundwater, a public resource. Plaintiffs preface their private nuisance claims on the allegation that defendants have contaminated the drinking water in Hoosick Falls and the surrounding area and that the impact of that contamination has had on the Hoosick Falls community.

These claims are inconsistent with the claim of private nuisance which the New York Courts of Appeals

have held impacts one person or relatively few. Because of that limitation, the Courts have held that where private plaintiffs bring a suit to remedy allegation of contamination of a drinking water supply, the claim is not one for private nuisance. The Southern District of New York dismissed private nuisance claim on alleged contamination of the Town of New Windsor water supply. It held that the options of large-scale impact of a contaminated water supply were not consistent with the sustainable --

THE COURT: Did you refer yet to the Baity case at all? Did that foreclose your private nuisance public distinction argument? That wouldn't apply to wells? Baity case, which denies summary judgment on the ground that the contamination of plaintiffs' private well, could constitute a special injury? Did you hold that or distinguish that?

MS. PREHEIM: I'm not sure the Baity case that you are referring to, your Honor, but here this -- the allegations here are the allegations of contamination to both the municipal supply and the private well which had large-scale -- as plaintiffs are alleging, have large-scale impact to the community at large.

THE COURT: Okay.

MS. PREHEIM: Likewise, the Alabama Federal

Court recently dismissed private nuisance claims brought by the property owners alleging PFOA contamination of the town drinking water supply and under Alabama law, like New York law, private nuisance is limited to its jurisdiction effect on one or few individuals.

So here, because named plaintiffs alleged contamination of town water supply and brought impact to the Hoosick Falls community, their claims do not sound improper nuisance.

So, in short, your Honor, based on the complaint as pleaded, plaintiffs do not state cognizable tort claims. They concede that they don't own the groundwater, which is a public resource held by the state and, indeed, the state is already working in cooperation with both defendants to investigate, remediate groundwater of Hoosick Falls.

The plaintiffs don't allege that they own the drinking water. They don't allege that they installed and paid for any treatment system. They don't allege any contamination of soil on their property. They don't allege that they are physically sick and, in fact, expressly claim that physical injury.

There are some things that plaintiffs can't allege. There are some things that plaintiffs perhaps have chosen not to allege. But on the complaint as

pleaded, whether they can state a cognizable claim is, they have not done so in this complaint.

THE COURT: Very good. Thank you. I guess we are -- Ms. Greenwald.

MS. GREENWALD: Thank you, your Honor. Robin Greenwald for the plaintiffs. Your Honor, I'd like to spend a few minutes putting this case in context, what happened to the people of Hoosick Falls because I think it goes to the heart of our complaint, which is, that people's property was invaded by the PFOA that was discharged by the defendants, traveled through groundwater and then into the drinking water taps of our plaintiffs. That's what our complaint alleges in every single aspect.

So about a year ago the residents of Hoosick Falls learned the first time that their water they had been drinking in their homes for decades was contaminated by PFOA from the activities of their defendants. Although health official advisory for PFOA drinking water is currently 70 parts per trillion, people learned that the drinking water they had been drinking was this high as 600 parts per trillion and even higher.

EPA told residents on the municipal water to stop drinking the water in their homes and to stop cooking with the water in their homes. The residents on

private wells were told by EPA not to use their water in their homes if the water tested at 100 parts per trillion or higher, and if their private well owners had yet had their water tested, EPA told them don't drink the water in your home. This is water that invaded their homes.

So the residents in Hoosick Falls had to stop using their water. Enduring the inconvenience of bottled water use in their homes for all uses and, more acutely, they have had to endure the uncertainty of whether they are still consuming PFOA in their drinking water, whether the properties that they own had any remaining value and whether they and their families suffered illnesses in the future as a result of having consumed PFOA in their drinking water in their homes for decades.

THE COURT: Defendants, in fact just now, stated it, seemed to allege that they don't disagree with, at this point, anything you're saying but they seem to say they're not liable because you -- you plaintiffs don't own the groundwater and there was no soil contamination. How would you get around that?

MS. GREENWALD: So, your Honor, we don't own the groundwater. That is correct. But once you extract the water, once one extracts the water from the aquifer for drinking water use, there is an ownership interest that attached to that and New York law has recognized

that in every single solitary case it has addressed.

And I'm actually -- so the defendants have really made a great effort to try to rewrite our complaint. But the only fair reading of our complaint, your Honor -- and I wanted to go through just through in summaries and because of time, the only fair reading of our complaint --

THE COURT: I'm going to read all the papers.

MS. GREENWALD: But I want to summarize so you don't have --

THE COURT: I want you to highlight.

MS. GREENWALD: Highlight some paragraphs for you.

THE COURT: Sure.

MS. GREENWALD: There was a physical, tangible invasion of PFOA and contaminated water into every plaintiff's home. Now, as to soil, the soil allegations, your Honor, is that in addition to the dumping the PFOA in floor drains and other landfills and whatever else that was discharged, the process of using PFOA causes vapors to go out of the stacks and when the vapors are contaminated with air, they turn into particulate matter and the wind carries those particulate matter throughout the community. That's what happens. But the particulate matter drops, and so that is alleged in our

complaint, in paragraph 41 and paragraph 70. We alleged that the particulate matter from these vapors are -- are discharged among the community.

So let me go through a little bit of summary for you, your Honor, about what we do allege in our complaint that shows that this case is about and only about people's contaminated drinking water in their home.

So, in Paragraphs 1 and 9, we allege that residents of Hoosick Falls had been drinking water -- drinking in their homes water laced with PFOA for years. In Paragraph 10 through 20 we go through each and every one of our class representatives and we allege that for each and every class representative, that each person drank contaminated water from his or her tap in his or her home until learning the water was contaminated with PFOA, at which time they stopped at the direction of the EPA.

In Paragraph 97, 100 and 112 we alleged that EPA informed residents of Hoosick Falls not to drink their water and I just -- Paragraph 92, 100 and 112, EPA told people not to drink their water in their homes, and I just went through that so I won't go into any more details. Again, assuming they had contamination at a certain level.

In paragraph 117, we allege that due to the

PFOA contamination in residents' homes, including our class representatives and class members, some of the Hoosick Falls residents bathed with sponges so as to avoid inadvertent ingesting water during their showers in their home and paragraph 40 and 71, as I just mentioned, that is where we have the allegations about the vapors that are coming from -- from this -- the manufacturing facilities.

So, your Honor, on -- the defense made a -- a lot of arguments about the fact that we don't allege any damage to the property but rusted pipes or whatever type of damage they're talking about. But even defendants in their brief, their opening brief on Page 33 and in their reply brief on Page -- I believe it's 5, I will correct that if I'm wrong -- they say that to show property damage, you have to show physical harm or an invasion and just gloss over invasion entirely.

There is nothing more relevant to an invasion than drinking water entering into your home, into your pipes and coming out of the taps that you drink to sustain your life.

So, to our knowledge, there is no New York case and New York Court that has ever found that a person cannot assert a property damage claim when the source of their contamination comes from groundwater that is relied

on for the plaintiffs' drinking water source.

Now, Your Honor asked earlier about Ivory. Ivory was not a drinking water case. Ivory was contaminated groundwater but as Your Honor notes, it was not drinking water, that was not the source of the groundwater drinking water of the people in that case. They got their water from somewhere else. The Ivory case --

THE COURT: Have you got a case that supports your contention that if it's drinking water that's contaminated?

MS. GREENWALD: Absolutely, your Honor. We have a whole lot of -- on Page 14 of our brief I actually have written that out so that it will be a -- some assistance here. On Page 14 of our brief we cite a number of cases, on Page 19 and 20, on Pages 21 through 23, and on Pages 25 through 26, and I can go through those cases, your Honor, but I don't think time permits. But we have so many cases and perhaps what's most relevant here is the MTBE case. Most recent -- it is not really more relevant than others, but that's the deal that went on for well over ten years in the Southern District of New York. Groundwater contamination throughout the country. Many, many states in the country and that allegation there was that there were underground

leakage storage tanks that leaked gasoline and other -- including MTBE up into the soil, rain then took that contamination into the groundwater, groundwater moved and then either municipal water providers or people on private wells pulled that water up for drinking water. That's what they do, that's the only source of water we have.

About half the country relies on groundwater for its drinking water and in those cases, in every single solitary case, nobody raised lack of standing. Nobody raised that. It was assumed that when you pull the water out of an aquifer, that it's contaminated, that either illness or makes water unpotable, that -- that there is a property damage. Why? Because there's an invasion of your property with a chemical that is not yours. It's the property of somebody else that invades your property and, tellingly, in the reply brief there's a mention of Exxon Mobil having MTBE case.

We address or brought up in a subsequent answer, I think the eighth amended answer or something, that Exxon Mobil raised this for the first time. It may have -- I don't really know but it is notable that Exxon Mobil did go to trial against the City of New York, City of New York sued Exxon Mobil and that case did go to trial and that case went to the Second Circuit, and the

Second Circuit -- Exxon Mobil did raise standing but it did not raise this issue and so the standing argument there was whether there was injury because the level of contamination was below the maximum contamination level, MCL. It was not that you can't assert property damage even though the chemical invades your property because it originally was in the groundwater.

And, your Honor, let me just spend a moment on a nuisance. I know I probably used up more time than I should but really -- as to property, there really is no case that I'm aware of that would hold otherwise and I should also add that most of the cases, in fact, I think almost every case but one that has addressed this has addressed it either in summary judgment or after trial. It is not addressed on a motion to dismiss because it is just common sense that when a contaminate enters the pipes in your home for your drinking water, that is the quintessential invasion of property.

So as to nuisance, I'm just going to address one issue and that is that the defendants' argument sort of boils down to its core, is that if you have more than a few people, you can't have a private nuisance but that's not the law in New York. The law in New York is a private nuisance threatens individuals, not the state. These essential elements being interference with the use

of or enjoyment of land actually by an individual or persons whose right has been disturbed.

In fact, the Court of Appeals held that the number of people impacted is not relevant to a determination of public rights, private nuisance and that was also in People versus Cooper which was a Second Department case.

So, here, the argument is sort of perversant with, if you are going to pollute, pollute a lot of people. Make it a lot of people whose homes are invaded, who can't use or enjoy their property because then you can avoid private nuisance. If you just do a few, then you can avoid private nuisance. That is not the law in New York and there really is no case that holds that where the holding is -- is dictated by the number of people impacted it is referenced -- your Honor, I don't want to misstate anything. It's referenced in cases but it is not the genesis of the whole case.

So I wish, unless Your Honor has any questions, I think that probably used up too much time.

THE COURT: Well, you all did well. I know you have a lot more to say but, number one, I expect you all said it in your papers, and which were extensive and we are going to be going over that, my three clerks and myself. If you wanted a minute to respond, I know --

MS. BIRNBAUM: That's all I want, your Honor, is a minute.

THE COURT: We will give you a minute.

MS. BIRNBAUM: Thank you, your Honor. I would like to just respond to the argument that the Schmidt line of cases somehow -- that wasn't any way affected by the Court's decision in Caronia. First of all, I would like to start from the Caronia case. By the way, the plaintiffs in Caronia relied on Schmidt as an exposure case and that they argued the same thing as plaintiffs are arguing here and it's not that decided.

It was clearly decided by the Court in Caronia. It was argued and it was reviewed and it was decided, and if you look at page and -- the discussion on Schmidt in this whole line of cases that is -- the plaintiffs are relying on, Schmidt, is discussed on 447 and Page 448 of the Court's decision and I'd just like to point out, the Court makes it very clear -- Court of Appeals -- that neither Schmidt or Askey question this state's long-held physical harm requirement, rather, they really -- they merely accept for accrual purpose, for statute of limitations accrual purposes that the injury accrued at the time of exposure.

And then the Court explains that 214(c) has overruled those cases because it now says that statute of

limitations runs from the time you have an injury and, therefore, those cases are overruled and if there was any doubt that these accruals of statute of limitations cases are different than whether you meet a present injury. The New York case of Penny, Eastern District Court of Penny against United Fruit, which was cited, says that these two concepts, the concept of accrual and the concept of individual, are factually and legally distinct. They are factually a -- so that whole line of cases has no bearing on whether there is a physical injury.

So, we now get to what plaintiffs say. That in Caronia they never argue that they had a physical injury. Well, they understood, they argued pretty much exactly what the plaintiffs are arguing here. They argued it in their briefs, they argued it in oral argument. What did they say? I quote: Plaintiffs were not merely exposed to cigarette smoke. Uncontroverted that they also suffered by harm to the tissues and cells of their lungs. That's what they argued to the Court and the Court said that, in effect, is not a physical injury. It's exposure. It's increased risk. It is not a physical injury.

So, all of the things that have been argued here were argued extensively and rejected by the New York

State Court of Appeals.

THE COURT: I understand. I understand that you disagree and I'm not going to keep going back and forth. I give a chance to revise --

MS. BIRNBAUM: Thank you.

THE COURT: Same one minute that Ms. Birnbaum took.

MS. PREHEIM: Thank you, your Honor. I have two very quick points. First of all, counsel talked about invasion of the home but if you look at the Ivory case, it was a groundwater contamination case that also alleged invasion from vapor invasion and air emissions from a contaminated groundwater and the Third Department in Ivory dismissed the trespass claims based on those allegations because they found that vapor invasions and air emissions were only intangible invasion and they distinguished soil contamination.

And then finally, your Honor, with respect to the standing drinking water cases that Ms. Greenwald cited, we -- we went through those cases in our brief and as she acknowledged, none of them addressed the issue of whether the plaintiffs in those cases owned the groundwater or had a standing to sue and, in fact, she acknowledged here today standing was assumed there.

Ivory is directly on point, directly -- in 2014

rejected tort claims based on alleged groundwater contamination because, and I'm quoting, groundwater does not belong to the owners of real property but is a natural resource entrusted in states by and for its citizens. So under New York law, the plaintiffs here do not have standing to assert groundwater contamination. Thank you, your Honor.

THE COURT: Thank you. Thank you, all. And I appreciate each of -- all of your arguments, and I'll consider everything and we will work on it and we will try to get a decision out expeditiously. I know it's important to all of you so we will take it that way. Thank you for coming up.

MR. SCHWARZ: Thank you.

MS. GREENWALD: Thank you, your Honor.

MS. BIRNBAUM: Thank you, your Honor.

(Whereupon, proceeding concluded)

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Official Court Reporter in and for the United States District Court for the Northern District of New York, hereby certify that the foregoing pages taken by me to be a true and complete computer-aided transcript to the best of my ability.

Lisa L. Tennyson

Lisa L. Tennyson, R.M.R., C.S.R., C.R.R.